Filed 1/6/09 Estate of Schiffer CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

Estate of DELIA BASKIN SCHIFFER, Deceased.	B206218 (Los Angeles County Super. Ct. No. BP089986)
CHRISTOPHER NICKOLOPOULOS, Petitioner and Appellant, v. PAULA L. WAGNER, as Administrator, etc., et al., Objectors and Respondents.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Mitchell L. Beckloff, Judge. Affirmed.

Tredway, Lumsdaine & Doyle, Joseph A. Lumsdaine, Matthew L. Kinley and Min N. Thai for Petitioner and Appellant.

Keith L. Meeker for Objector and Respondent Betty Brown.

Hubka & Hubka and Cheri L. Hubka Sparkhawk for Objector and Respondent Paula L. Wagner, as administrator of the Estate of Delia Baskin Schiffer.

Mark Baskin and Philip Baskin, in pro. per., for Objectors and Respondents.

I. INTRODUCTION

Petitioner, Christopher Nickolopoulos, appeals from a judgment denying his petition to probate a lost will. The probate court found petitioner had entered into a settlement agreement and release with respect to any and all claims against the estate and therefore could not seek to probate a lost will. We agree and affirm the judgment.

II. BACKGROUND

Petitioner was the long-time companion of Delia Baskin Schiffer (the decedent). The decedent died on January 10, 2005. Prior to her death, in August 1998 and again in May 1999, the decedent purportedly wrote to petitioner indicating she intended him to be the beneficiary of her estate to the extent of at least $500,000. Following the decedent's death, a mutual friend, Thomas Savapoulos, spoke to petitioner. Mr. Savapoulos said he had witnessed a will executed by the decedent. In the will discussed by Mr. Savapoulos, the decedent named petitioner as her beneficiary. Additionally, shortly after the decedent's death, a mutual acquaintance, Randy Nelson, spoke with petitioner. According to Mr. Nelson the decedent had shown him a will. In the will shown to Mr. Nelson, the decedent named petitioner as her beneficiary.

On March 9, 2005, Paula L. Wagner was named administrator of the decedent's estate. On September 29, 2005, petitioner filed a creditor's claim for $69,996. Petitioner declared that on February 21, 1979, "I signed over a cashier[']s check to decedent as a loan." Petitioner previously had attempted, unsuccessfully, to recover the funds from the decedent in a civil action.

On July 14, 2006, petitioner's attorney, Julius Johnson, sent to Ms. Wagner's attorney, Cheri L. Hubka Sparhawk, copies of letters dated August 3, 1998,[1] and May 26, 1999.[2] The letters were purportedly written by the decedent to petitioner. Mr. Johnson advised: "Please find enclosed copies of two letters written to Mr. Nickolopoulos by the decedent, Delia Baskin Schiffer. [¶] The first letter, dated August 3, 1998, promised to pay back $69,000 she borrowed from [him] upon the sale of her property. This promise to pay back the money is an acknowledgement of the debt she owed to my client. It is made after the trial you say decided that no money was owed. [¶] The second letter, dated May 26, 1999, not only acknowledges the debt of the $69,000 but it clearly indicates that Ms. Schiffer had a Will, that she left my client and her sister Betty $500,000 each and that she intended the bulk of her estate to go to the City of Hope. [¶] . . . [¶] As a result, Mr. Nickolopoulos' claim for $69,000 plus interest should be honored. [¶] Mr. Nickolopoulos wants me to join forces with the attorney for the City of Hope and pursue the $500,000 referenced in the May 1999 letter. However, if I can

---

1 The August 3, 1998 letter states: "Chris I don[']t want you to worry. [¶] When I came to your apartment and made you dinner the other day you looked down and out. I want you to know that no matter what has happened between us I don't want you to worry. The sixty nine thousand dollars I borrowed from you will be paid as soon as I sell my property and we will buy a nice house near [S]anta [A]nita racetrack. [¶] You and betty my baby sister are in my will Definitely. So you won[']t have to worry about your future if I am gone. I have keys to your apartment and you have keys to my house[.] I do not want you to be sick. Love, Delia Schiffer."

2 The May 26, 1999 letter states: "Chris in reference to the past letter I mailed you in August of 1998, I like to clarify that from my will $500,000 are to be given to my sister Betty, and $500,000 to you plus the $69,000 that I owe you $1,000 each to my adopted Kids, Balance of my estate as you have always known goes to the city of hope Love Delia Baskin Schiffer [¶] p.s. I sent betty and you a copy of as to how my will is to be diversified and most important as you know City of Hope[.]" Evidence was subsequently introduced to the effect that the signature on the May 26, 1999 letter was a forgery.

assure him that his claim for the $69,000 with interest will be honored, I believe I can convince him that he should settle for that without the heavy litigation that pursuing the $500,000 would entail."

In October 2006, the petitioner and Ms. Wagner, as administrator, executed a settlement agreement and release (the settlement agreement). Both parties were represented by counsel. The settlement agreement stated: "WHEREAS there is pending in the Superior Court . . . a Creditor's Claim by Christopher Nickolopolous [sic] in the Estate of Delia Baskin Schiffer . . . . [¶] WHEREAS the PARTIES now wish to settle all claims and release, discharge and terminate any and all rights and liabilities between the PARTIES. [¶] NOW THEREFORE, the PARTIES agree as follows: [¶] SETTLEMENT [¶] CONSIDERATION: [¶] This AGREEMENT is being executed for and in consideration of the payment of the sum of Fifty-Five Thousand Dollars ($55,000) by the [estate] payable to [petitioner and his attorney], and that no further petitions, motions, or litigation of any nature concerning any matters between the parties shall be maintained or prosecuted in the above designated matter. [¶] The PARTIES agree that upon execution of this AGREEMENT, Administrator will file with Court a Partial Allowance of Creditor's Claim . . . and [petitioner] will refrain from all further claims or litigation in any action concerning the [estate]. [¶] COST OF LITIGATION: [¶] . . ."

The settlement agreement included a release: "In consideration of the agreement referred to herein, all PARTIES, on behalf of themselves and their predecessors, heirs, executors . . . do hereby release and forever discharge all adversarial PARTIES hereto and all of their agents, servants, employees . . . for all demands, liens, assignments, contracts, covenants, actions, suits, cause of actions, obligations, costs, expenses, attorneys' fees, damages, losses, claims, controversies, judgments, orders and liabilities of whatsoever kind and nature in equity or law, whether now known or unknown, suspected or unsuspected, and whether or not concealed or hidden, which have existed or may have existed, or which do exist, or which hereafter can, shall, or may exist, including but without [in] any respect limiting the generality of the foregoing, any and all claims

which were or might have been, or which could have been, alleged by the Parties against each other in their individual or representative capacity. [¶] As this is a compromise and release of all claims, Claimant, Christopher Nickolopoulos, waives the provisions of Probate Code sections 9000 et seq., specifically the time provisions of [Probate Code] 9353 for rejected claims."

Moreover, the settlement agreement contained a waiver of rights pursuant to Civil Code section 1542: "WAIVER OF CIVIL CODE SECTION 1542 [¶] It is the intention of the PARTIES hereto that the foregoing mutual release shall be effective as a bar to all demands, liens, assignment, contracts, covenants, actions, suits, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, controversies, judgment, orders, and liabilities of whatsoever character, nature and kind, known or unknown, suspected or unsuspected, and whether or not concealed or hidden, hereinabove specified to be so barred; in furtherance of this intention, the parties hereto expressly, knowingly, and voluntarily waive any and all rights and benefits conferred upon them by the provisions of Section 1542 of the California Civil Code . . . . [¶] The PARTIES hereto acknowledge that the foregoing waiver of the provisions of Section 1542 of the California Civil Code, and any other comparable statues or law[s] . . . including claims arising under California Insurance Code Section 790.03 and breaches of the covenant of good faith and fair dealing, was separately bargained for and is an essential and material term of this AGREEMENT. The PARTIES hereto expressly consent that this release shall be given full force and effect in accordance with each and all of its express terms and provisions, relating to unknown and unsuspected claims, demands, causes of action, if any, to the same effect as those terms and provisions relating to any other claims, demands, and causes of action hereinabove specified."

Finally, the settlement agreement contained other provisions including an integration clause: "ENTIRE AGREEMENT [¶] This Agreement constitutes the entire AGREEMENT between the PARTIES hereto pertaining to the subject matter hereof, and fully supersedes any and all prior understandings, representations, warranties, and

agreements between the PARTIES hereto, or any of them, pertaining to the subject matter hereof, and may be modified only by written agreement signed by all of the PARTIES hereto. [¶] INDEPENDENT ADVISE OF COUNSEL [¶] The PARTIES hereto, and each of them, represent and declare that in executing this AGREEMENT, they rely solely upon their own judgment, belief and knowledge, and the advice and recommendation of their own independently selected counsel. [¶] VOLUNTARY AGREEMENT [¶] The PARTIES hereto, and each of them, further represent and declare that they have carefully read this AGREEMENT and know the contents thereof and that they signed the same freely and voluntarily."

On December 20, 2006, petitioner filed a petition to probate a lost will. Petitioner asserted he was the intended executor and sole heir of the estate under a California statutory will executed by the decedent on November 7, 2002. Petitioner testified at deposition that on November 29 or 30, 2006, he received a copy of the lost will in the mail from an anonymous source. Ms. Wagner and two of the decedent's adopted children, Kim Baskin and Betty Brown, objected to the petition on the ground, among others, that petitioner had waived all claims relating to the estate. Mark Baskin and Philip Baskin filed a joinder.[3] The objectors subsequently produced evidence the will was forged. On November 20, 2007, Ms. Wagner and Ms. Brown also filed a motion for an order enforcing the settlement agreement. They presented evidence the settlement agreement was intended to encompass all of petitioner's claims, including any right as a beneficiary of the estate. Ms. Wagner's attorney, Cheri L. Hubka Sparhawk, declared: "[Petitioner] *could not produce the original* of either the August 3, 1998 or the May 26, 1999 letters which were alleged[ly] sent to him *by Decedent*. Also the substance of the letters appeared to be inconsistent with the turbulent years of litigation between

---

3 Ms. Wagner and Ms. Brown filed a respondents' brief on appeal. Mark Baskin and Philip Baskin filed a letter in pro. per. and joined in that brief. (Cal. Rules of Court, rule 8.200(a)(5).)

[petitioner] and the Decedent. Nevertheless, the heirs were interested in closing the estate and resolving the conflict with [petitioner]. In negotiations with [Mr.] Johnson regarding a settlement, it was understood that if the Estate paid any sum of money to [petitioner], he would execute a general release of all claims, including pending and future in the Estate, whether known or unknown, including those suggesting he might have an interest in the estate, and **that no further litigation in any action concerning the Estate could be maintained by [petitioner].** [¶] . . . As the Estate had discovered, [petitioner's] creditor claim . . . had been the subject of earlier litigation . . . . Although that case had been resolved in Decedent's favor, Decedent's heirs and the Administrator believed it to be in the best interests of the estate, in light of [Mr.] Johnson's July 14, 2006, letter, to settle with [petitioner] and thereby avoid costly and time-consuming litigation over his claims against the estate as both a creditor and a potential heir and expedite the closing and distribution of the Estate to the Decedent's intestate heirs. It was thus agreed to pay [petitioner] $55,000 as a full and final settlement on the condition that he sign a broad, general release. [¶] . . . **At no time** during the negotiation of the settlement[] did [petitioner] or his attorney suggest or request to exclude any claims from the general release. At the time of the negotiation of the settlement, [petitioner] and his attorney did not request to exclude any claims from the release that he might have as an heir under the alleged November 7, 2002, Will, or any other Will. Indeed, had he done so, the Estate would have refused. There would have been no benefit for the estate in settling with [petitioner]. . . . .[¶] . . . During his deposition in this matter, [petitioner] testified . . . that on November 29, 2006, he received, from *an unknown source*, *a photocopy* of a November 7, 2002, Will allegedly executed by the Decedent. He also testified that he **was aware, well over a year prior to his execution of the Settlement Agreement,** that a Will was allegedly executed by the Decedent naming him as Executor and leaving to him her entire estate. He was so informed [by Mr. Nelson and Mr. Savapoulos]." (Original italics and boldface, fns. omitted.) In response, petitioner presented evidence he never intended to waive his rights as a beneficiary.

Mr. Johnson declared: "At the time of negotiating the settlement . . . I had no idea of the existence of the will dated November 7, 2002, offered into probate by [petitioner], nor did I ever discuss its existence with my client prior to the drafting and execution of the agreement to settle his creditor's claim against the estate. [¶] . . . [¶] . . . At no time during the course of the negotiations . . . did [Sheri Hubka, the attorney for Paul Wagner] disclose the existence of the will and she did not address her intent that the agreement would deprive [petitioner] of his inheritance rights in the estate. [¶] . . . [¶] . . . [¶] . . . ." The trial court sustained objections to Mr. Johnson's declaration, and petitioner has not challenged those rulings on appeal. The portions of Mr. Johnson's declaration as to which objections were sustained have not been quoted. Petitioner declared: "Although[] I had been told that a will existed, I had never seen the will and had no personal knowledge of its contents. When I signed the settlement agreement in September of 2006 I was only trying to recover the debt owned to me by [the] estate. I had no intention that the settlement would affect any rights I might have if a will were discovered."

The probate court granted the motion to enforce the settlement agreement and dismissed with prejudice the petition to probate the lost will. The probate court ruled petitioner executed the settlement agreement with knowledge of potential inheritance claims and rights in and to the estate; and the release included all inheritance claims and rights. A judgment was entered on February 5, 2008. The judgment was entered in favor of Ms. Brown, Ms. Wagner, individually and as Administrator, and the Baskins. This appeal followed.

III. DISCUSSION

A. Ambiguity

Petitioner argues: the settlement agreement's scope is ambiguous because it refers specifically to his creditor's claim and to him as a claimant; there is no mention of the right to probate a will being waived; counsel for the administrator could have included language encompassing a petition to probate a will, but did not; and petitioner could not have intended to release his rights under the November 7, 2002 will because he did not then know it existed. The threshold determination of ambiguity is subject to de novo review; we independently construe the settlement agreement as a matter of law. (*Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, 892; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165-1166.) We conclude the broad and clear language of the settlement agreement shows the parties intended to encompass all known and unknown claims, including petitioner's rights, if any, under the later discovered will.

First, it is true the settlement agreement does not specifically discuss a petition to probate a will. But it does repeatedly and comprehensively refer to the parties' intent to settle any and all possible claims with respect to the estate and to give the release full force and effect. The Supreme Court has held, "[It is a] long established general rule that—in the absence of fraud, deception, or similar abuse—a release of '"[a]ll [c]laims"' [citations] covers claims that are not expressly enumerated in the release." (*Jefferson v. Department of Youth Authority* (2002) 28 Cal.4th 299, 305, quoting *Skrbina v. Fleming Companies* (1996) 45 Cal.App.4th 1353, 1360 and *Edwards v. Comstock Insurance Co.* (1988) 205 Cal.App.3d 1164, 1166.) The parties also expressly waived the protections of Civil Code section 1542. Where the parties expressly waive all rights under Civil Code section 1542, that language "establishes unambiguously the parties' intent that the release cover" possible civil claims. (*Jefferson v. Department of Youth Authority, supra,* 28 Cal.4th at pp. 306-307; see *Casey v. Proctor* (1963) 59 Cal.2d 97, 113.)

Second, there was no extrinsic evidence establishing the parties' intent to exclude potential claims under a subsequently discovered will from the scope of the release. (*Jefferson v. Department of Youth Authority, supra,* 28 Cal.4th at pp. 301-307, 310; *Winet v. Price, supra,* 4 Cal.App.4th at pp. 1166-1167.) Third, the settlement agreement cannot be avoided by petitioner's testimony he never intended to waive the right to pursue claims under a will; petitioner's undisclosed intent—which is contrary to the clear and express language of the release—does not entitled him to relief from its effect. (*Jefferson v. Department of Youth Authority, supra,* 28 Cal.4th at p. 303; *Casey v. Proctor, supra,* 59 Cal.2d at p. 105; *Palmquist v. Mercer* (1954) 43 Cal.2d 92, 98, quoting *Smith v. Occidental & Oriental Steamship Co.* (1893) 99 Cal. 462, 470-471; *Bardin v. Lockheed Aeronautical Systems Co.* (1999) 70 Cal.App.4th 494, 505, 506, 507; *Skrbina v. Fleming Companies, Inc., supra,* 45 Cal.App.4th at pp. 1366, 1367; *San Diego Hospice v. County of San Diego* (1995) 31 Cal.App.4th 1048, 1053, 1054; *Winet v. Price, supra,* 4 Cal.App.4th at pp. 1164, 1166, fn. 3, 1167, 1173. Fourth, our Supreme Court has held that when a person has knowledge of a potential claim at the time of executing a general release, that individual bears the burden of expressly excepting the possible cause of action from the release. (*Jefferson v. Department of Youth Authority, supra,* 28 Cal.4th at p. 310; see *Mitchell v. Union Central Life Ins. Co.* (2004) 118 Cal.App.4th 1331, 1341.)

When he executed the settlement agreement, petitioner knew there *might* be a will naming him as a beneficiary. Mr. Savapoulos had revealed he had witnessed such a will. Mr. Nelson also said he had seen such a will. Further, the decedent purportedly had written a letter to petitioner attesting to her intent to leave him $500,000. Therefore, the burden was on petitioner to expressly except a potential inheritance claim from the scope of the settlement agreement. (*Jefferson v. Department of Youth Authority, supra,* 28 Cal.4th at p. 310; see *Kohler v. Interstate Brands Corp.* (2002) 103 Cal.App.4th 1096, 1100, disapproved on another point in *Claxton v. Waters* (2004) 34 Cal.4th 367, 379, fn. 3.) The only reason to probate the purported lost will naming petitioner as the sole

beneficiary would have been for petitioner to claim that inheritance in contravention of the settlement agreement.

B. Fraud

Petitioner asserts the settlement agreement was obtained through fraud. Without *any* citation to the record, petitioner argues: "[T]he trial court erred in finding that [petitioner] released something not then known to him, much less, something purposefully concealed from him. [Petitioner] had no way of accessing [the decedent's] effects once she became ill, and the temporary conservator . . . took possession of her keys, home, personal effects, and safe deposit box. [Petitioner] could only rely on the statements of others that no will was found or existed. [¶] Contrary to what he was told, [the decedent] indeed had a will. [The decedent's] will was anonymously mailed to [petitioner] shortly after he signed the settlement agreement and release. It must have been known by the sender that it was the intent of the estate to obviate [the decedent's] testamentary intent. The trial court should have inferred that [petitioner] was being defrauded out of his inheritance rights as the sole beneficiary to his f[r]iend and companion's estate. [¶] The court should have ruled consistently with the public policy of this State that the testamentary intent be honored whenever possible. It is clear that [the decedent] intended [petitioner] to be taken care of after her passing as he had done for her during life. The gift in [the decedent's] will was natural considering the estrangement of [the decedent's] adopted children and her otherwise lack of relationship with her family. Her friend and companion was [petitioner], whom she desired to leave her estate."

Petitioner has not cited any evidence in the record in support of his claim the will was purposefully concealed from him. Nor does he cite any legal authority for the proposition the trial court should have inferred he was being defrauded. Pursuant to well established authority, this is not proper argument. (See, e.g., *Associated Builders &*

Contractors, Inc. v. San Francisco Airports Com. (1999) 21 Cal.4th 352, 366, fn. 2; *People v. Barnett* (1998) 17 Cal.4th 1044, 1107, fn. 37; *Building etc. Assn. v. Richardson* (1936) 6 Cal.2d 90, 102; *Estate of Randal* (1924) 194 Cal. 725, 728-729; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1245-1246; *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003-1004 & fn. 2; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700; *Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448; *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546; *Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1.) It does not warrant discussion.

IV. DISPOSITION

The judgment is affirmed. Objectors, Paula L. Wagner, as administrator of the Estate of Delia Baskin Schiffer, Betty Brown, Mark Baskin and Philip Baskin are to recover their costs on appeal from petitioner, Christopher Nickolopoulos.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

MOSK, J. KRIEGLER, J.